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No. 82-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF RESPONDENTS

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COUNTER QUESTIONS PRESENTED

Since *American Pipe* holds that the "precise tolling effect" of denial of federal class action certification is determined by the limitations scheme governing the substantive cause of action involved, should not the "precise tolling effect" of loss of class character of a 42 U.S.C. § 1983 federal class suit be governed by the relevant forum state's limitations scheme pursuant to 42 U.S.C. § 1988 and *Tomanio*?

If *American Pipe's* tolling rule of suspension is a *judicial* tolling rule generally applicable to federal class suits denied class certification, should not state tolling law nevertheless be applicable to 42 U.S.C. § 1983 federal class suits because a *judicial* tolling rule is not a "law of the United States" within the meaning of 42 U.S.C. § 1988?

If *American Pipe's* tolling rule of suspension is a Rule 23 interpretation generally applicable to federal class actions denied class certification, should not Rule 23 nevertheless be interpreted as inapplicable to § 1983 federal class suits in order to avoid a violation of the Rules Enabling Act?

If *American Pipe's* tolling rule of suspension is a Rule 23 interpretation generally applicable to federal class suits denied class certification, then where Puerto Rico tolling law provides for renewal of the relevant limitations period as a matter of substantive right, does not Rule 23 as applied to a 42 U.S.C. § 1983 federal class suit filed in Puerto Rico abridge or modify substantive rights of unnamed members of the class in violation of the Rules Enabling Act?

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BRIEF OF RESPONDENTS

OTHER STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2072

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

31 L.P.R.A. § 5303 (Puerto Rico)

Prescription of actions is interrupted by their institution before the courts, by extrajudicial claim of the creditor and by any act of acknowledgment of the debt by the debtor.

COUNTER STATEMENT OF THE CASE

Respondents (hereafter called "Plaintiffs") wish to direct the Court's attention to the following:

1. The class action filed on June 19, 1978 by Ortiz Rivera was brought as a Rule 23(b)(1) and (2) suit. (J.A. 8a) After the District Court denied certification for lack of numerosity on August 21, 1978, there was filed a motion for reconsideration (J.A. 18a-24a) which was denied on September 29, 1978, followed next by a motion for leave to filed an Amended Complaint joining all the Plaintiffs (J.A. 29a-48a) which was denied on November 24, 1978. Finally, there was a motion for reconsideration of the latter (J.A. 54a-72a) which was denied on December 11, 1978.

2. The jury's general verdict rendered in favor of the Plaintiffs on the question of the violation by Petitioners

(hereafter called "Defendants") of their First Amendment rights under § 1983 was also premised on Defendants' violation of Plaintiffs' rights under 18 L.P.R.A. § 249(e).[1] The latter statute served as the basis for Plaintiffs' Puerto Rico pendent statutory claims (J.A. 11a-12a) regarding which the jury was specifically instructed in these cases. (Tr. 727-28). Defendants never asked the District Court, as they could have, to inquire whether the jury's verdict was based on § 1983, on § 249(e), or on both. On appeal, Plaintiffs raised this matter at pp. 49-50 of their Brief in the First Circuit and at pp. 10-12 of their Brief in Opposition to Petition for Certiorari.

3. With respect to computing the Puerto Rico one-year limitations period, Plaintiffs did not, contrary to Defendants' assertion at pp. 8-9 of their Brief, rely on 1 L.P.R.A. § 72's "holiday" language. Rather, Plaintiffs relied on Rule 6 of the Federal Rules of Civil Procedure and on Rule 68.1 of the Puerto Rico Rules of Civil Procedure, both of which exclude the last Saturday and Sunday for time computation purposes under "any applicable statute." Plaintiffs' Petition for Rehearing and Modification of Judgment in the First Circuit at pp.2-3.

SUMMARY OF ARGUMENT

These cases provide this Court with an opportunity to promote the important federalism interests protected by

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[1] 18 L.P.R.A. section 249(e) reads as follows:

> "The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed, and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignments, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status."

42 U.S.C. § 1988 and at the same time to affirm the vindication by a Puerto Rico federal jury of the Plaintiffs' First Amendment rights under 42 U.S.C. § 1983. Thus this Court need not choose between § 1988 federalism interests and § 1983 policies.

In *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), this Court, following earlier decisions, interpreted 42 U.S.C. § 1988 as requiring the use of the forum state's limitations and tolling law in § 1983 actions brought in federal court. The Court emphasized the Congressional intent underlying § 1988, the intimate relationship between a state's limitation scheme and its tolling law, and the strong federalism interests in this use of state law.

In the present cases, the Plaintiffs filed their individual § 1983 suits well within a year after the denial of certification for lack of numerosity of a timely filed § 1983 class action which had been brought in Puerto Rico District Court with them as unnamed members of the class. Under Puerto Rico law, whose application § 1988 mandates, the one-year limitations period of 31 L.P.R.A. § 5298(2) was renewed when the class action lost its class status. Such renewal is comparable to the effect of savings statutes in the majority of states, as discussed by this Court in *Burnett* v. *New York City Rr. Co.*, 380 U.S. 424 (1965).

That Plaintiffs' suits were timely is supported by *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974) a Clayton Act case which similarly involved the tolling effect on unnamed members of a class of the denial of class certification to a federal class action. *American Pipe* first addressed the relationship between Rule 23 and statutes of limitations in general, and held that the filing of a Rule 23 class action tolls the governing statute of limitations. This Court then went on to apply a tolling rule

of suspension to the unnamed members of the class after denial of class certification. As to the latter, however, the Court repeatedly emphasized its reliance on the Congressional Clayton Act limitations scheme with its tolling rule of suspension that was applicable to antitrust causes of action.

American Pipe thus did not set out a generally applicable tolling rule of suspension whenever class status is lost; instead, it insisted that the relevant limitations scheme must determine the "precise tolling effect" of loss of class status. Because § 1988 mandates that the relevant limitations and tolling law for § 1983 suits, whether brought by individuals or as class actions, is that of the forum state, in these cases Puerto Rico law governs. Thus, the Rule 23 interests considered in *American Pipe* and the federalism interests protected by § 1988 and addressed in *Tomanio* are accommodated without conflict.

But even if *American Pipe's* tolling rule of suspension for federal class suits which lose their class status is not based solely on the Clayton Act but rather is a *judicial* tolling rule of general applicability, Puerto Rico law nonetheless governs in these cases. § 1988's very language, as well as this Court's case law, requires that state tolling law be used where the "laws of the United States," meaning *federal statutory law*, are deficient. A *judicial* tolling rule thus does not qualify as a "law of the United States" and hence state law—here, Puerto Rico law—must be applied.

Alternatively, if the *American Pipe* tolling rule of suspension is a Rule 23 interpretation of general applicability, then it should be read as inapplicable to § 1983 federal class actions so as to avoid a violation of the Rules Enabling Act, 28 U.S.C. § 2072. However, if as a Rule 23 interpretation it were found applicable to § 1983 federal class actions, at least in these cases this tolling rule would

violate the Rules Enabling Act because it would abridge or modify Plaintiffs' substantive rights under Puerto Rico limitations and tolling law.

ARGUMENT

I. Both *American Pipe* And 42 U.S.C. § 1988 Require The Application Of State Tolling Law To Determine The "Precise Tolling Effect" Of The Denial Of Class Certification to § 1983 Federal Class Suits

A. *American Pipe's* Distinction Between "General Tolling" And "Precise Tolling Effect"

In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), the State of Utah, on May 13, 1969, filed a Sherman Act treble damages class action against American Pipe, eleven days short of a year after a final consent judgment had been entered on May 24, 1968, against American Pipe in a civil antitrust action brought by the United States almost five years earlier. Utah's Rule 23(b)(3) class action was found timely by the District Court under the four-year limitations period for antitrust actions because Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b), provided for suspension of the limitations period for private actions during the pendency of any United States antitrust proceeding and for one year following.

The District Court thereafter held on December 4, 1969, that the Utah suit could not be maintained as a class action for lack of numerosity and so ordered. Eight days later, on December 12, 1969, other members of the proposed class moved to intervene as parties. The District Court refused to allow intervention on the ground that the limitations period of Section 5(b) had already run against them. Reversing, the Court of Appeals held that suit was actually commenced by Utah on behalf of the members of the proposed class and that this rendered improper the District Court's denial of their request to intervene.

Affirming, this Court first held, after an extensive discussion of Rule 23 and statutes of limitation in general, that the commencement of Utah's Rule 23(b)(3) class action stopped the running of the statute of limitations for all unnamed members of the proposed class during the pendency of the motion to strip the action of its class character. The Court then held, applying the Clayton Act's suspension provision, that upon the class action's loss of its class character for lack of numerosity, the previously suspended limitations period continued to run. The Court concluded that because the Utah suit was filed with eleven days remaining under Section 5(b) of the Clayton Act, the intervenors had eleven days after the class decertification to move for permission to intervene. Hence, their motions were timely, and they were not time barred.[2]

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[2] Defendants attempt to interject an *American Pipe*-related issue which is neither properly before this Court nor in fact implicated in these cases. In their Brief at p. 12 n.18 and p. 30 n.14, they suggest that the *American Pipe* rule, whatever its scope, is limited to cases in which the unnamed members of the class make timely motions to intervene after the class suit is denied certification. However, Defendants never raised this issue before, and apparently became aware of it only when this Court granted certiorari in *Parker* v. *Crown, Cork and Seal Co.*, 677 F.2d 391 (4th Cir.), *cert. granted*, 51 U.S.L.W. 3352-53 (Nov. 9, 1982), on the very same day certiorari was granted in these cases. Thus, Defendants clearly waived this issue. Also, this Court granted certiorari in these cases *solely* to deal with the relationship among *American Pipe*, 42 U.S.C. § 1988 and *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980). (J.A. 162a). Finally, on the merits, the Plaintiffs in effect moved for leave to intervene after the denial of class status when the class action Plaintiff, together with other members of the previously proposed class, filed a timely motion pursuant to Rule 15 requesting leave to amend the class action complaint to include all of these named individual Plaintiffs. (J.A. 29a-48a). This motion, denied on November 21, 1978 (J.A. 53a), was followed by a motion for reconsideration, which was

1. "General Tolling"

This Court in *American Pipe* explicitly dealt with two different aspects of tolling. When it addressed the Rule 23 interests, it ruled on what Plaintiffs will call the "general tolling" question relating to the *filing* of a class suit, as follows:

> "We are convinced that the rule most consistent with federal class action procedure must be that *the commencement of a class action suspends the applicable statute of limitations* as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. (emphasis added)

This "rule," as applied to federal class actions in general and § 1983 federal class actions in particular, requires that upon their filing, the running of the relevant statute of limitations is stopped so long as possible class action status remains.

"General tolling" is functionally necessary for the protection of the interests of unnamed members of the proposed class regardless of whether the class continues as such or is ultimately determined not appropriate for certification. As *American Pipe* points out, this protection is provided for all unnamed members of the class who might subsequently participate in the suit. Otherwise, the only way they could assure participation in the judg-

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filed on November 29, 1978 (J.A. 54a-72a) and denied on December 11, 1978.

If this Court were to hold that *American Pipe* is inapplicable to these cases, Plaintiffs nevertheless would contend that under 42 U.S.C. § 1988, Puerto Rico law governs in these cases as to both "general tolling" and "precise tolling effect." See the analysis of Puerto Rico law at pp. 18-21 *infra*.

ment if the class suit were allowed to continue, or could preserve the timeliness of their individual claims if the class suit later lost its status, would be to file pre-limitations motions to join or intervene. This would, of course, frustrate the very purposes of Rule 23: litigative efficiency and economy. 414 U.S. at 551.

In these cases, therefore, *American Pipe* mandates that the original filing of these political discrimination cases as a § 1983 class action stopped the running of the one year Puerto Rico statute of limitations so long as class status was not lost. The First Circuit in fact applied the "general tolling" rule of *American Pipe* to these cases.[3] Similarly, when the Ninth Circuit in *Pavlak* v. *Church*, 681 F.2d 617 (9th Cir. 1982), asserted that "the federal rule, not the state law, governs the tolling issue relevant here . . .," *id.* at 619, the court was referring to the "general tolling" rule of *American Pipe*.

2. "Precise Tolling Effect"

American Pipe dealt in addition with what Plaintiffs call the "precise tolling effect" on unnamed class members resulting from the loss of class action status. This Court reasoned:

> "It remains to determine *the precise effect the commencement of the class action had on the rele-*

[3] It was only in connection with "general tolling" and not the "precise tolling effect" of loss of class status, discussed next, that the First Circuit stated that "there is no discernible state rule" (J.A. 135a). Because Puerto Rico class action rules are modeled on Rule 23 (J.A. 135a), the First Circuit apparently thought it necessary by reason of 42 U.S.C. § 1988 to apply *American Pipe's* "general tolling" as a matter of Puerto Rico law. This approach to *American Pipe's* "general tolling," while it led to the correct result, goes farther than required by Plaintiffs' Argument I.

> *vant limitation period.* Section 5(b) of the Clayton Act provides that the running of the statutes of limitation be '*suspended*' by the institution of a Government antitrust suit based on the same subject matter. The same concept leads to the conclusion that the commencement of the class action in this case suspended the running of the limitation period only during the pendency of the motion to strip the class of its class action character. The class suit brought by Utah *was filed with 11 days yet to run* in the period as tolled by § 5(b), *and the intervenors thus had 11 days after the entry of the order denying them participation in the suit as class members in which to move for permission to intervene . . .*" 414 U.S. at 560-561. (emphasis added)

It is clear from *American Pipe* that once a class is stripped of its class action character, the "precise tolling effect" question is governed not by any universally applicable federal rule of suspension, but rather by the limitations scheme applicable to the particular substantive cause of action. In *American Pipe* itself, Section 5(b) of the Clayton Act provided that the "precise tolling effect" was suspension of the limitations period. This Court borrowed the Clayton Act's "precise tolling effect" and applied it to the consequences of the District Court's order "stripp[ing] the suit of its class action character." Such borrowing was consistent with this Court's sensitivity to Congressionally determined policies underlying the Clayton Act's limitations scheme. 414 U.S. at 561. It was also consistent with the Advisory Committee's Note on Proposed Rule 23, quoted in *American Pipe*, regarding the "precise tolling effect" issue resolved in *American Pipe*:

> "[T]he question 'whether the intervenors in the nonclass action shall be permitted to claim . . . the benefit of the date of the commencement of the action for purposes of the statute of limitations [is] to be de-

> cided by reference to the laws governing . . . limitations as they apply in particular contexts.' " 414 U.S. at 554 n.24.

Plaintiffs' interpretation of *American Pipe* draws considerable support from this Court's earlier decision in *Burnett* v. *New York City Rr. Co.*, 380 U.S. 424 (1965). There, a suit under the FELA, 45 U.S.C. § 51 *et. seq.*, was filed in state court shortly before the three year federal statute of limitations had run. The defendant had been served with process but the case was dismissed for improper venue. Eight days later, after the three year limitations period had expired, the FELA suit was refiled in federal court. Describing the tolling issue as one of "legislative intent," this Court said. "[T]he basic inquiry is whether Congressional purpose is effectuated by tolling the statute of limitations in given circumstances." 380 U.S. at 427.

The Court, after analyzing the purposes and statutory scheme of the FELA, went on to hold: (1) the filing of the FELA action in state court tolled the FELA three year limitations period and (2) the tolling continued until the state court's dismissal order for improper venue became final. This Court reasoned:

> "[B]oth Congress and the States have made clear, through various procedural statutes, their desire to prevent timely actions brought in courts with improper venue from being time-barred merely because the limitation period expired while the action was in the improper court." *Id.* at 434.

Several features of *Burnett* are highly significant here. First, just as *Burnett* distinguished between the tolling effect of filing the state FELA action and the effect of the state court's dismissal for improper venue, so too did *American Pipe* distinguish between the tolling effect of filing the federal class action ("general tolling") and the "precise tolling effect" of the loss of class status. These

distinctions follow from the fact that neither a state court's dismissal for improper venue nor a federal court's decision refusing to certify a class for lack of numerosity is a decision on the merits.

Second, *American Pipe* and *Burnett* both focused on Congressional intent respecting tolling for their respective federal causes of action. Thus, in *American Pipe* Congressional antitrust policy supported the federal "precise tolling effect" rule of suspension; in *Burnett* Congressional FELA policy supported a "precise tolling effect" rule based on when a state court's dismissal order becomes final under state law. Indeed, if state law governs "precise tolling effect" in a *Burnett* FELA situation where there is no explicit Congressional mandate to use state law in this way, surely state law governs where Congress expressly so indicates. As will be seen next, Congressional policy for § 1983 actions, as set out in 42 U.S.C. § 1988, requires that state tolling law govern "precise tolling effect."

In short, under *American Pipe*, the "precise tolling effect" of a § 1983 federal class action must be determined by the limitations scheme applicable to § 1983 actions and not by any universally applicable tolling rule of suspension. That limitations scheme and its attendant tolling law are, by reason of 42 U.S.C. § 1988 and *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), determined by state law. It will be demonstrated that in these cases the applicable Puerto Rico tolling law determines that the "precise tolling effect" of the denial of class certification is the *renewal* of the applicable one year Puerto Rico statute of limitations.

This approach to *American Pipe's* "precise tolling effect" as applied to § 1983 class suits stripped of their class action character was correctly adopted by the First Circuit in these cases. In contrast, the Ninth Circuit in

Pavlak v. *Church*, 681 F.2d 617 (9th Cir. 1982), dealt, as noted earlier, only with "general tolling." *Pavlak* never reached the "precise tolling effect" question implicated in class suits which lose their class status because it held for unrelated reasons that the plaintiff there could not even avail herself of the benefit of *American Pipe's* "general tolling." *Id.* at 620-21. *Pavlak* therefore is inapposite.

B. 42 U.S.C. § 1988 And *Tomanio*

This Court has long and consistently held that in the absence of Congressional provision of a relevant federal limitations period, state statutes of limitation govern § 1983 actions. *O'Sullivan* v. *Felix*, 233 U.S. 318 (1914). *Cf. Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975). Indeed, this was and still is the general rule for most federal causes of action filled in federal courts. *Campbell* v. *City of Haverhill*, 155 U.S. 610 (1895); *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). This rule is based on the view that Congress by its silence must have intended that state limitations law apply. *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946). Recently, this Court explained in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), that in § 1983 cases filed in federal court the "laws of the United States" are deficient in not providing a statutory limitations period. Therefore 42 U.S.C. § 1988 requires that the limitations law of the forum state govern § 1983 actions, unless state limitations law is "inconsistent" with the federal policy underlying the § 1983 cause of action.[4]

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[4] In *Robertson* v. *Wegmann*, 436 U.S. 584 (1978), the Court had previously found that the "laws of the United States" were similarly deficient in not providing a statutory survivorship rule. Therefore, § 1988 required that state survivorship law be applied to § 1983 suits.

Not only is a state's limitation law applicable to § 1983 actions, but so too is a state's tolling law. This Court expressly held in *Board of Regents* v. *Tomanio*, *supra*, that the forum state's tolling law is an inextricable part of its limitations scheme and therefore governs § 1983 suits brought in federal court. *Tomanio* dealt with a New York chiropractor whose request for a waiver of a chiropractor's examination was turned down by the board of regents without an evidentiary hearing on November 22, 1971. In January, 1972, plaintiff initiated state court proceedings challenging this waiver refusal as arbitrary and capricious; she did not, however, raise any constitutional challenge in the state proceedings. In November, 1975, the New York Court of Appeals affirmed an order of an intermediate appellate court which had ruled against plaintiff. Then, in June, 1976, plaintiff brought her § 1983 action in federal court alleging that the board's refusal to grant the waiver request and give her a license violated due process.

Both the District Court and Second Circuit ruled on the merits in plaintiff's favor after they rejected the defendants' argument that the applicable three-year New York statute of limitations barred plaintiff's action. While plaintiff's § 1983 claim arose in November, 1971 when the request for waiver was denied, both courts held that the three-year limitations period was tolled during the state court litigation. Her § 1983 action filed in June, 1976 was not time-barred, they found, because the tolling period ran from January, 1972 to November, 1975. In this regard both courts used a *judicially created federal tolling rule* which the Second Circuit considered justified "in the interest of advancing the goals of federalism."

This Court reversed without reaching the merits. It relied on the language of § 1988 and on its earlier deci-

sions in *Robertson* v. *Wegmann*, 436 U.S. 584 (1978) and *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), for the principle that the New York rule for tolling the three-year statute of limitations—not a judicially created federal tolling rule—must be applied. This Court reasoned as follows:

> "Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under § 1983—a void which is commonplace in federal statutory law. When such a void occurs, this Court has repeatedly 'borrowed' the state law of limitations governing an analogous cause of action . . . Although the Court of Appeals found that respondent's action was governed by a three-year New York statute of limitations, the court did not apply the New York rules governing the circumstances under which that statute of limitations could be tolled.
>
> *In § 1983 actions, however, a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases, they are binding rules of law.* In § 1988, Congress 'quite clearly instructs' when federal law provides no rule of decision for actions brought under § 1983 . . . As we held in *Robertson* [v. *Wegmann*], by its terms, § 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is 'inconsistent with the Constitution and laws of the United States.'
>
> In . . . [*Johnson* v. *Railway Express Agency* we said:]
>
> '*Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action.* Although any statute of limitations is necessarily arbitrary, *the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in*

> *favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.* In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.' " 446 U.S. at 484-86. (emphasis added) (citations omitted)

This Court then found that New York tolling law did not provide for tolling the three-year statute during the pendency of state court proceedings. It also concluded that New York tolling law was not "inconsistent" (within the meaning of § 1988) either with the § 1983 policies of deterrence and compensation, or with the general federal policies of uniformity and federalism. Thus, the *Tomanio* plaintiff's § 1983 action was time-barred.

Clearly, then, when § 1983 suits are brought by individuals in federal court, § 1988 mandates that tolling questions are answered by recourse to state law. When § 1983 class action suits are brought in federal court, *American Pipe*, properly understood, requires that the limitations scheme applicable to § 1983 actions govern the "precise tolling effect" of denial of class certification. The applicable limitations scheme, according to § 1988 and *Tomanio*, is the forum state's limitations scheme with its tolling law.

This reading of *American Pipe*, § 1988 and *Tomanio* properly accommodates the federal interests in efficiency and economy in federal class action litigation. It further ensures, both in general and as applied to these cases, the "essential fairness" to defendants provided by statutes of limitation. As was true in *American Pipe* itself, the filing

of the § 1983 class suit in these cases "notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." 414 U.S. at 555. Moreover, this reading furthers the federalism interest in state value judgments regarding the proper balance between policies of repose and fairness to plaintiffs. Indeed, to a much greater extent than mere Congressional silence, *Campbell* v. *City of Haverhill*, 155 U.S. 610 (1895), § 1988 as a Congressionally enacted statute gives federal weight to such state value judgments.

Hence, Plaintiffs frankly argue that under *American Pipe* they can have it both ways: *American Pipe* mandates "general tolling" as a result of filing a proposed § 1983 class action in federal court, while *American Pipe*, § 1988 and *Tomanio* require that the forum state's law determines the "precise tolling effect" on unnamed members of the federal class of denial of class certification. This approach avoids the anomaly of applying one tolling rule to an individual § 1983 suit and another tolling rule to a § 1983 class action, where both are brought in federal court. It also assures that the same state tolling rules will apply to all § 1983 suits, whether brought in federal or state courts.

In contrast, reading *American Pipe*, as Defendants do, to require that suspension, and suspension alone, is the "precise tolling effect" in *all* federal class actions, including § 1983 class actions, would twist *American Pipe's* meaning, would undercut significant interests in federalism and, as discussed in Arguments II and III, would create conflicts with § 1988, *Tomanio* and the Rules Enabling Act, 28 U.S.C. § 2072. Such a suspension rule, moreover, would not significantly promote procedural

uniformity because it would necessarily be applied to many federal and state statutes of limitations with very different limitations periods.

In these cases, therefore, under *American Pipe* itself, Puerto Rico tolling law, applied pursuant to § 1988, determines the "precise tolling effect" of the District Court's denial of certification for Plaintiffs' proposed § 1983 class action on the ground of lack of numerosity. As discussed next, the First Circuit correctly found under Puerto Rico law that the District Court's denial of class certification renewed the one year limitation period for all members of the class.

C. Puerto Rico Tolling Law And The Similarity To Saving Statutes

Plaintiffs at the outset emphasize Puerto Rico's weighty interests in having its tolling law of renewal apply to determine the "precise tolling effect" of the stripping of the class character of § 1983 class actions. For one thing, its tolling law, as enacted by the legislature and uniformly interpreted and applied by Puerto Rico courts, reflects Puerto Rico's balancing of the interests in universally recognized policies of repose against interests in fairness to plaintiffs. For another, all of the parties in these cases are Puerto Rican, and hence there is no unfairness, as the First Circuit properly observed, in applying to them the relevant Puerto Rico tolling law. Plaintiffs cannot understand Defendants' rather remarkable assertion that the First Circuit simply manufactured Puerto Rico tolling law in order to rule for Plaintiffs, especially since Defendants themselves conspicuously avoided analyzing any Puerto Rico law whatever in their Brief.

1. Puerto Rico Law

31 L.P.R.A. § 5303, which is based on the Spanish Civil Code, reads as follows:

> "Prescription of actions is interrupted *by their institution before the courts*, by extrajudicial claim of the creditor and by any act of acknowledgment of the debt by the debtor." (emphasis added)

Under section 5303, it is clear that when an individual files a lawsuit, the relevant Puerto Rico statute of limitations is interrupted, even before service of process, *Feliciano* v. *A.S.A.*, 93 P.R.R. 638 (P.R.S.Ct. 1966), and even if the suit is dismissed upon motion for nonsuit, *Parilla* v. *Loiza Sugar Co.*, 52 P.R.R. 232 (P.R.S.Ct. 1937), or for want of jurisdiction, *Diez* v. *Green*, 32 P.R.R. 749 (P.R.S.Ct. 1924). The general rule was stated by the Puerto Rico Supreme Court in *Moa* v. *Commonwealth*, 100 P.R.R. 572, 589 (P.R.S.Ct. 1972), as follows:

> "[T]he mere effective filing of a complaint before a court within the period of prescription . . . produces the interruptive effect on the extinctive prescription of the action exercised, regardless of the vicissitudes that may arise subsequent to the filing of the complaint. . . ."

Even though there was no Puerto Rico class action decision on all fours, the First Circuit properly interpreted Puerto Rico tolling law and its class action statute, P.R. Laws Ann. tit. 32, App. II, R. 20.1, in holding that the Plaintiffs could benefit from the tolling effect of the filing of the § 1983 class suit. (J.A. 133a-135a) In this respect, Puerto Rico law functions in the same way as *American Pipe's* "general tolling" rule, discussed earlier.

However, once the class was denied certification in August, 1978, the First Circuit correctly ruled (J.A. 135a-136a) that the one-year limitations period began to

run anew under Puerto Rico law. That is, under section 5303, in contrast to merely continuing the running of a previously suspended statute of limitations, a new limitations period began when the class was denied certification.[5] *Heirs of Gorbea* v. *Portilla*, 46 P.R.R. 279 (P.R.S.Ct. 1934) (the limitation period "must be counted anew"); *DeJesus* v. *DeJesus*, 37 P.R.R. 143 (P.R.S.Ct. 1927) ("[I]t becomes evident that the prescription of the action was interrupted by the mere act of filing the complaint and that interruption has for its effects that the time for the prescription must be computed anew.") *See also Feliciano* v. *A.S.A.*, 93 P.R.R. 638 (P.R.S.Ct. 1966), where the Puerto Rico Supreme Court said in connection with interruption by judicial claim:

> "[T]he new period begins to run from the time that the litigation action, the commencement of which interrupted the period, ends."

To the same effect is *Josefa Duran Cepeda* v. *Ismael Morales Lebron*, P.R.S.Ct. 1982 (Appendix 1a-8a to Plaintiffs' Brief in Opposition to Petition). Therefore, the § 1983 suits of the Plaintiffs, all of which were filed within one year of August 21, 1978 (the date of denial of class certification), were timely.

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[5] Louisiana, a French civil law jurisdiction, has a similar limitations and tolling scheme which provides for "interruption" of prescription by the timely filing of a civil suit. LSA-R.S. 9:5801. As stated in *Derbofen* v. *T. L. James & Company, Inc.*, 274 So.2d 734 (La.App. 1973): "A suit which interrupts prescription (here, the first suit) prevents prescription from running until that suit's final determination *at which time the full prescriptive period begins to run anew.*" *Id.* at 738 (emphasis added). *See also Burnett* v. *N. Y. Central R. Co.*, 380 U.S. 424, 432 n.9 (1965).

The First Circuit's interpretation and application of Puerto Rico law must be deferred to in these cases because of its expertise in Puerto Rico civil law, *Pagan Torres* v. *Negron Ramos*, 578 F.2d 11 (1st Cir. 1978), and the Spanish civil law system itself. *See Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42-43 (1970), and *Bonet* v. *Texas Co*, 308 U.S. 463, 470 n. 17 (1940). In this regard, the First Circuit was free to consider all of the data that a Puerto Rico court would use in deciding these tolling issues. *Cf. Commissioner* v. *Estate of Bosch* 387 U.S. 456, 465 (1967), and C. Wright, *Federal Courts* § 358, at 269 (3d ed. 1976).

2. The Similarity to Saving Statutes

Puerto Rico's renewal approach to tolling, while based on section 5303 and the Spanish Civil Code, is not unusual even in common law jurisdictions. Thus, for example, it has long been established at common law that a debtor's acknowledgment of a debt "revives" the creditor's cause of action. *Developments in the Law-Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1254-1260 (1950). Indeed, this very rule is embodied in section 5303 which provides for tolling "by any act of acknowledgment of the debt by the debtor." Puerto Rico goes beyond this application of claim renewal to include "extrajudicial claim[s] of the creditor,"[6] as well as the institution of suits "before the courts." It turns out, however, that Puerto Rico's renewal rule, when applied to suits "instituted . . . before the

[6] This part of section 5303 is not now before the Court, but was addressed by the First Circuit in these cases. (J.A. 141a-144a). That court expressed no doubt about Puerto Rico's renewal rule as applied to extrajudicial claims, but ruled that Plaintiffs protest letters did not constitute such claims.

courts," is very similar to the saving statutes found in a majority of states.[7]

Saving statutes provide generally that where a party has commenced an action which fails for some reason not related to the merits, another action on the same claim may be brought within a specific limited period following dismissal of the first action. *Burnett* v. *New York City Rr. Co.*, 380 U.S. 424, 431-32 (1965), discussed at pp. 11-12, *supra*. These situations typically involve dismissals for lack of jurisdiction or improper venue. Thirty-one states have adopted such saving statutes while fourteen others have somewhat different statutes which provide that upon reversal on appeal of a judgment for plaintiff or on arrest of judgment for plaintiff where the action was timely commenced, the plaintiff has additional time to start a new action *Id.* at 431-32 n. 9; W. Ferguson, *The Statutes of Limitation Saving Statutes* 2 (1978). It is also significant, given Puerto Rico's renewal of its one-year limitations period in these cases, that twenty-one states with saving statutes provide a period of one year in which to start a new action. W. Ferguson, *supra* at 379. Six states use a six-month period, while one uses a five-year period. *Id.* Only one state suspends the limitations period during the pendency of the first suit, in certain situations, while using six-month or one-year periods in others. Va. Code 1950 § 8.01-229.

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[7] *See also* this Court's observation in *Burnett* v. *New York City Rr. Co.*, 380 U.S. 424, 434 (1965):

> "[B]oth Congress and the States have made clear, through various procedural statutes, their desire to prevent timely actions brought in courts with improper venue from being time-barred merely because the limitation period expired while the action was in the improper court."

Consequently, from the perspective of this national survey, Puerto Rico's section 5303 renewal rule for actions instituted before the courts, as interpreted and applied by the Puerto Rico Supreme Court and the First Circuit in these cases, is not at all aberrational. It is *American Pipe's* suspension rule, based on the Clayton Act, which is unusual.[8] This illuminates what Plaintiffs argue in these cases: the denial of class certification for lack of numerosity is comparable to the dismissal of a suit for lack of jurisdiction or improper venue. Through § 1988, that denial brought into play Puerto Rico's equivalent of a saving statute which renewed the relevant one-year limitations period.

Plaintiffs observe, finally, that there has never been any claim by Defendants that the foregoing Puerto Rico tolling law is "inconsistent" with the compensation and deterrence purposes of § 1983. Such a claim would be unpersuasive in these cases because applying Puerto Rico tolling law to the Plaintiffs *vindicates* their § 1983 claims. There is also no inconsistency with any policies of repose applicable to these Puerto Rico Defendants, as the First Circuit found (J.A. 136a). And surely there is none with federalism policies where it is Puerto Rico law that is to be applied. Moreover, even if it had turned out that Puerto Rico tolling law were considerably more pro-plaintiff than the tolling law of other jurisitions, there would still have been no such inconsistency. This Court in *Robertson* v. *Wegmann*, 436 U.S. 584, 591-92 (1978) suggested that while Louisiana survivorship law was in cer-

[8] The Clayton Act did not contain a saving provision of the kind described above. Nor was there a generally applicable federal saving statute.

tain ways more pro-plaintiff than most, it would nevertheless be applied pursuant to § 1988 in appropriate § 1983 cases filed in federal court.

II. Despite *American Pipe's* Judicial Tolling Rule, 42 U.S.C. § 1988, As Interpreted In *Tomanio*, Mandates That State Tolling Law Apply To § 1983 Federal Class Actions Denied Certification

Even if this Court does not accept Plaintiffs' proposed mutual accommodation of *American Pipe* and § 1988 as set out in Argument I, there are other compelling reasons why state tolling law must govern the "precise tolling effect" of stripping § 1983 federal class actions of their class character. The *American Pipe* rule, insofar as Defendants argue that it universally requires suspension where class actions are denied certification, is a *judicial tolling rule*.[9] As such, as will be shown, it is inapplicable in § 1983 federal class actions by reason of § 1988's mandate to apply state tolling law when the "laws of the United States," meaning only federal *statutes*, are deficient. Consequently, while the *American Pipe* suspension rule may well apply to most federal class actions upon loss of their class status, and is admittedly not limited to anti-trust class actions, it does not apply to § 1983[10] class actions brought in federal court which are denied class

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[9] Plaintiffs focus here on the "precise tolling effect" part of *American Pipe* and not on "general tolling" relating to the filing of a class action. The latter, whether governed in § 1983 federal class suits by *American Pipe* or by § 1988 and *Tomanio*, leads to the same result in Puerto Rico. *See* the discussion of Puerto Rico law at pp. 18-21, *supra*, and the First Circuit's opinion (J.A. 134a-135a).

[10] Or to federal class actions brought under §§ 1981, 1982, 1985(3) or any other federal civil rights statute covered by § 1988.

certification. Instead the forum state's tolling law applies; in these cases the relevant tolling law is Puerto Rico's renewal rule.

A. The *American Pipe* Rule Is A Judicial Tolling Rule

Federal courts have long possessed "judicial power to toll statutes of limitation in federal courts," as recognized in *American Pipe* itself. 414 U.S. at 558. Plaintiffs submit that the *American Pipe* rule, which only suspends upon loss of class status, is an application of this judicial power, and is not an interpretation of Rule 23. This characterization of the *American Pipe* rule is supported by the language of Rule 23 which says nothing on its face about tolling. It is also supported by the Advisory Committee's Note on Proposed Rule 23 which, as quoted in *American Pipe*, states in relevant part that the tolling issue relating to the loss of class status is "to be decided by reference to the laws governing . . . limitations as they apply in particular contexts." 414 U.S. at 554 n. 24. Moreover, throughout this Court's opinion in *American Pipe* there are references to "the tolling rule *we* establish here"; "recognizing *judicial power* to toll statutes of limitation in federal courts . . . [is] not breaking new ground"; and "[o]ur conclusion that a *judicial tolling* of the statute of limitations. . . ." *Id* at 555, 558, and 558 n.29, respectively. (emphasis added)

B. The "laws of the United States," Within The Meaning Of 42 U.S.C. § 1988, Are Silent Regarding Tolling In § 1983 Federal Class Actions

The *American Pipe* judicial tolling rule of suspension does not apply to § 1983 class actions denied certification. § 1988 requires a court to look first to whether any relevant federal *statutory* law exists. In *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980) and *Robertson* v. *Weg-*

mann, 436 U.S. 584 (1978), the lower federal courts, in ruling for the plaintiffs, had established *judicial* tolling and survivorship rules. However, this Court nevertheless held, in reliance on § 1988, that *state* tolling and survivorship rules govern § 1983 actions. Therefore, when this Court spoke in *Tomanio* of the fact that "federal law provides no rule of decision for actions brought under § 1983," 446 U.S. at 484, it must have meant federal *statutory* law and *not* federal decisional law, for there was already a judicially created tolling rule in *Tomanio* and a judicially created survivorship rule in *Robertson*.

That § 1988 requires federal *statutory* law to be looked to is evident from § 1988's language. § 1988 speaks of the "laws of the United States," which must be applied unless they are "deficient," then almost immediately thereafter refers in contrast to "the common law," as modified by a state's constitution and statutes. Inasmuch as "common law" is decisional, the clear implication of § 1988's "laws of the United States" is that the phrase covers only federal statutory law. Further, § 1988 may be viewed as analogous [11] to the Rules of Decision Act, 28 U.S.C. § 1652, as interpreted by *Erie* v. *Tompkins*, 304 U.S. 64 (1938). § 1988 requires the use of state substantive statutory and decisional law in certain civil rights cases while the Rules of Decision Act does the same in diversity cases. Inasmuch as state law governs diversity cases under the Rules of Decision Act "except where the Constitution or treaties of the United States or *Acts of Congress* otherwise require or provide" (emphasis added), § 1988's "laws of the United States" should be interpreted similarly as referring only to federal statutory law.

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[11] This analogy is relied on in Defendants' Brief at p. 17.

This interpretation of § 1988 makes sense for yet another reason. As *Tomanio*, *Robertson* and even *American Pipe* show, a federal common law of tolling and survivorship can be developed rather readily. If the phrase "laws of the United States" is understood to include federal decisional law, § 1988 would be rendered virtually meaningless. For these reasons this Court in *Tomanio* and *Robertson* correctly interpreted § 1988's "laws of the United States" to refer only to federal *statutory* law.

This crucial distinction for § 1988 purposes between federal statutory law and federal decisional law is made even clearer by comparing this Court's decisions in *Carlson* v. *Green*, 446 U.S. 14 (1980) and *Robertson*. In *Carlson*, decided *after Robertson*, this Court applied a uniform judge-made federal rule of survivorship to a *Bivens* action against federal officials. *Carlson* distinguished *Robertson*, which had rejected such a judge made survivorship rule for 1983 actions. This Court emphasized that § 1983 actions are different from *Bivens* actions because § 1988 requires that a forum state's survivorship law apply to § 1983 actions.

Because the *American Pipe* suspension rule for class actions denied certification is a judicial tolling rule and not a creation of federal statute, the cases relied on by Defendants at pp. 17-18 and pp. 23-24 of their Brief do not help them. *Bomar* v. *Keyes*, 162 F.2d 136 (2nd Cir.), *cert denied*, 332 U.S. 825 (1947), a § 1983 case, did not even discuss the § 1988 issue of concern this case. But even if it had done so and reached the same conclusion, *Bomar* would still have been readily distinguishable on the ground that there, Rule 3 of the Federal Rules of Civil Procedure explicitly answered the question of when an action is "commenced" for tolling purposes. Indeed, this

very reasoning—that Rule 3 constitutes federal statutory law—was in fact used in *Cohen* v. *Board of Education of East Ramapo Central School District*, 536 F. Supp. 486 (S.D.N.Y. 1982), also a § 1983 case, which held, following *Bomar*, that the particular federal statutory law was thus not deficient within the meaning of § 1988.

Similarly, *Hanna* v. *Plumer*, 380 U.S. 460 (1965) and *Sibbach* v. *Wilson*, 312 U.S. 1 (1941), are distinguishable in that they are diversity cases in which the relevant provisions of the Federal Rules of Civil Procedure were held to govern. *Byrd* v. *Blue Ridge Rural Electric Co.*, 356 U.S. 525, 537 (1958), also a diversity case, dealt with the "influence . . . of the Seventh Amendment" on the assignment of "disputed questions of fact to the jury." In contrast, in our cases the *American Pipe* suspension rule for class suits denied class certification is not as such an interpretation of Rule 23[12] but is rather, for the reasons suggested, a judicial tolling rule which cannot apply to § 1983 class suits because of § 1988.

Defendants' characterization of various accrual decisions of this Court and other federal courts as embodying "federal procedural principles" is simply wrong. These cases, which involved the question of when different federal causes of action accrue, dealt instead with this issue of federal substantive law: when does a federally created statutory cause of action come into existence? Thus, in *Rawlings* v. *Ray*, 312 U.S. 96, 99 (1941), this Court held that the question of "when there [is] a complete and present [federal] cause of action . . . is a federal

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[12] Plaintiffs in Argument III deal with the implications of treating the *American Pipe* suspension rule for class actions denied certification as a Rule 23 interpretation.

question and turns upon . . . the applicable federal legislation." This Court's answers to these accrual questions are always matters of federal, not state, law and therefore are binding not only where such federal statutory causes of action are brought in federal courts but also, by reason of the Supremacy clause, where such actions are brought in state courts.

Consequently, whenever § 1983 class actions are brought in federal court, state law, pursuant to § 1988, and *not American Pipe's* judicial tolling rule, determines the tolling effect of loss of class status. In these cases, the applicable tolling law is that of Puerto Rico which, as discussed earlier, renewed the Puerto Rico one year limitations period.

III. Even If *American Pipe's* Tolling Rule Of Suspension Is A Rule 23 Interpretation, It Does Not Apply When § 1983 Federal Class Actions Are Denied Class Certification

Even if this Court's *American Pipe* holding respecting the "precise tolling effect" of stripping a Rule 23 class action of its class character constitutes an interpretation of Rule 23[13] and is not a judicial tolling rule, § 1988 nevertheless requires that the forum state's tolling law govern § 1983 class actions. Rule 23 and § 1988 should be interpreted so as to minimize conflict between them. More important, such an interpretation will avoid a violation of the Rules Enabling Act, 28 U.S.C. § 2072, by Rule 23. Indeed, this Court avoided a comparable violation in *Wal-*

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[13] Here, as in Argument II, Plaintiffs deal only with the "precise tolling effect" of denial of class certification, and not with *American Pipe's* "general tolling." Whether *American Pipe* or § 1988 governs the latter in § 1983 federal class suits, the result is the same under Puerto Rico law. *See* note 9, *supra*.

ker v. *Armco Steel Corporation*, 446 U.S. 740 (1980), discussed later. Thus, *American Pipe's* interpretation of Rule 23 should not cover § 1983 federal class actions stripped of their class character. These should instead be governed by § 1988's mandate to use state tolling law.

If Rule 23 is understood in light of *American Pipe* as requiring the applicability of a federal tolling rule of suspension even to § 1983 federal class actions stripped of their class character, then *as applied to these cases* Rule 23 abridges or modifies substantive rights under Puerto Rico law in violation of the Rules Enabling Act, 28 U.S.C. § 2072.

A. In Order To Avoid A Violation Of The Rules Enabling Act, *American Pipe's* Tolling Rule Of Suspension Should Be Interpreted As Not Governing § 1983 Federal Class Actions Denied Class Certification

Even if *American Pipe* construes Rule 23 as setting out a tolling rule of suspension for class actions stripped of their class character, Rule 23 should not be interpreted in this respect as applicable to § 1983 federal class actions which lose their class status. This interpretation is sound because nowhere in this Court's decision in *American Pipe* is § 1988 even mentioned. Rather, *American Pipe* dealt with the Clayton Act's statute of limitations and with the Clayton Act's statutory tolling provision. More generally, as mentioned earlier, the Advisory Committee's Note on Proposed Rule 23 indicates that different limitations schemes may lead to different tolling results in different class action cases.[14]

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[14] See pp. 10-11, *supra*.

Additionally, as argued later, interpreting *American Pipe* as imposing a tolling rule of suspension on *all* federal class suits which lose their class character, including § 1983 class suits, would create a conflict in these cases between Rule 23 and the Rules Enabling Act, 28 U.S.C. § 2072. However, this conflict may be avoided by limiting the scope of *American Pipe's* reading of Rule 23 (insofar as it deals with the tolling effect of denial of class certification) to federal class actions *except for those governed by § 1988.*

This Court similarly avoided a troublesome Rules Enabling Act issue in *Walker* v. *Armco Steel Corporation*, 446 U.S. 740 (1980). *Walker* involved the question of whether, in a diversity action, a federal court should follow state law or Rule 3 of the Federal Rules of Civil Procedure on the issue of when an action is commenced for the purpose of tolling a state statute of limitations. This Court first acknowledged that the relevant Oklahoma statute represented "a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations." *Id* at 751. It next stated that Rule 3, in contrast, "does not replace such policy determinations found in state law." *Id* at 752. The Court then held that because there was no conflict between Rule 3 and Oklahoma limitations law, Oklahoma law governed. There was accordingly no need to apply the Rules Enabling Act analysis set out in *Hanna* v. *Plumer*, 380 U.S. 460 (1965).

There is therefore no need in these cases to reach the Rules Enabling Act issue discussed next. This does not mean that Rule 23 is thereby to be artificially and narrowly construed, but only that it is to be given its "plain meaning." *Walker*, 446 U.S. at 750 n. 9. The plain meaning of Rule 23 is that it was not intended to displace state

tolling law respecting the "precise tolling effect" of denial of class certification to a § 1983 federal class suit. The existence of § 1988, the Advisory Committee's comments to the same effect,[15] and the absence of any clear indications to the contrary in *American Pipe* itself, all support Plaintiffs' contention that a Rule 23 tolling rule of suspension is not applicable to class actions governed by § 1988, including the § 1983 class suit originally filed in these cases.

B. If Rule 23 Requires The Application Of A Tolling Rule Of Suspension To § 1983 Federal Class Actions Denied Class Certification, Then As Applied To These Cases Rule 23 Abridges Or Modifies Plaintiffs' Substantive Rights Under Puerto Rico Law And Thereby Violates The Rules Enabling Act

After *Hanna* v. *Plumer*, 380 U.S. 460 (1965), the Rules Enabling Act, 28 U.S.C. § 2072, is the touchstone for the validity of individual rules of the Federal Rules of Civil Procedure. The Rules Enabling Act provides in relevant part that such rules, in order to be valid, must not "abridge, enlarge or modify any substantive right. . . ." While Plaintiffs recognize that no Federal Rule has ever been held invalid by this Court on this basis, they submit that if Rule 23 requires that a federal tolling rule of suspension must be applied to the § 1983 suits in these cases, Rule 23 abridges or modifies substantive rights under Puerto Rico law.

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[15] It is especially telling that this Court in *Walker* read the Advisory Committee's Note on Rule 3 as only *predicting* that a *Walker*-type issue could arise, and *not* that Rule 3 was *intended* to deal with that issue. 446 U.S. at 750 n.10. Given the Advisory Committee's Note on Rule 23 and tolling, Plaintiffs contend that the same interpretation must be given to Rule 23 so as to avoid a conflict between Rule 23 and the Rules Enabling Act.

In *American Pipe*, this Court, dealing with a comparable Rules Enabling Act issue in a federal antitrust setting, observed: "[T]he proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." 414 U.S. at 557-58. When it applied this approach in the *American Pipe* case itself, the Court relied on its understanding of the antitrust acts and on their legislative history for its conclusion that tolling the Clayton Act limitations period did not abridge or modify a substantive right.

In contrast, in *Walker* v. *Armco Steel Corporation*, 446 U.S. 740 (1980), this Court concluded that the Oklahoma statute was "*a statement of substantive decision* by that State that actual service on, and accordingly, actual notice by, the defendant is *an integral part of the several policies served by the [Oklahoma] statute of limitations.*" *Id* at 751. (emphasis added). As discussed earlier, *Walker* ultimately turned out not to involve a conflict between Rule 3 and the Oklahoma statute. However, the significant feature of *Walker* for present purposes is its inquiry into Oklahoma law, both statutory and decisional, as support for its determination that Oklahoma's "service rule must be considered part and parcel of the statute of limitations." *Id* at 752.

Similarly, Puerto Rico's section 5303 tolling rule of renewal is "part and parcel" of its statute of limitations scheme. This limitations scheme with its one-year statute of limitations applies by reason of § 1988 both to the § 1983 class suit originally filed here and to the Plaintiffs' individual § 1983 suits. Because section 5303's renewal rule is substantive, as discussed next, the tolling rule of suspension of *American Pipe* and Rule 23 cannot validly apply to the § 1983 suits of these Plaintiffs under the Rules Enabling Act.

The earlier discussion of Puerto Rico tolling law with emphasis on the importance of its Spanish Civil Code basis, demonstrated the close relationship between Puerto Rico's limitations scheme and its section 5303 tolling rule of renewal. That is, regardless of whether there is a lawsuit, an extrajudicial claim or an acknowledgment of a debt by a debtor, the limitations renewal rule is universally applicable. *Josefa Duran Cepeda* v. *Ismael Morales Lebron* (P.R.S.Ct. 1982) (Appendix 1a-8a to Plaintiffs' Brief in Opposition to Petition).

Even more significant is the Puerto Rico Supreme Court's decision in *Manuel Febo Ortega* v. *Superior Court of Puerto Rico* (P.R.S.Ct. 1974) (Appendix 24a-27a to Plaintiffs' Brief in Opposition to Petition). Dealing with the question whether a compulsory counterclaim filed by a defendant is time-barred where the plaintiff's previously filed claim is timely, the Puerto Rico Supreme Court asserted:

> "The distinction between the substantive and the procedural is often faint and blurred, *but not in this case*. What is to be decided here is how and in whose behalf the statute of limitations may be interrupted, *having in mind that the limitation of actions is not a procedural, but a substantive matter, with which our Civil Code specifically deals in arts. 1840-1874, 31 L.P.R.A. §§ 5261-5304*." (Id. at 25a). (emphasis added)

Ultimately ruling that the defendant's counterclaim was not time-barred, the Puerto Rico Supreme Court characterized the "true foundation" of statutes of limitations as a presumption of abandonment or relinquishment on the part of the plaintiff which furthers the "purposes of social need and utility, which require that suits must be instituted within the specified terms."

Puerto Rico statutes and case law thus show that Puerto Rico's limitations and tolling scheme is not solely designed with the procedural end of making "the process of litigation a fair and efficient mechanism for the resolution of disputes." Ely, *the Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 724 (1979). Puerto Rico's scheme does more. In certain circumstances, as where the limitations period has run without tolling, it protects the state of mind of the potential defendant. In other circumstances, as where the limitations period has been tolled and thereby renewed, it protects the state of mind of the actual or potential plaintiff. Further, in this later tolling situation Puerto Rico has emphatically declared that it is *not* "unfair to require the defendant to attempt to piece together his defense to an old claim" or to deny such a defendant "peace of mind." *Cf. Walker* v. *Armco Steel Corporation*, 446 U.S. at 751.

These policies promoted by Puerto Rico's limitations and tolling scheme thus indicate that Puerto Rico has conferred substantive rights[16] upon the Plaintiffs within the meaning of the Rule Enabling Act. Therefore, Rule 23's tolling rule of suspension cannot validly be applied to their § 1983 suits.

CONCLUSION

These § 1983 political discrimination cases provide a vehicle by which this Court can reaffirm the important federalism interests protected by § 1988 and at the same

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[16] The Puerto Rico Supreme Court recently reaffirmed the substantive nature of its limitations and tolling law when it stated: "We have decided that 'prescription' is a substantive and not a procedural matter, governed by the principles which given form to civil law." *Andres Olmo* v. *Young and Rubicam of Puerto Rico*, No. R-80-215 (P.R.S.Ct., 1981) (citing *Manuel Febo Ortega*).

time vindicate the significant First Amendment rights which the Puerto Rico federal jury found had been violated by these Defendants. Thus, this Court is not here faced, as it was in *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), *Robertson* v. *Wegmann*, 436 U.S. 584 (1978) and *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), with the need to choose between protecting § 1988 federalism interests on the one hand and vindicating § 1983 policies on the other.

Plaintiffs ask this Court to rule that Puerto Rico tolling law was properly applied to these § 1983 suits and thus to affirm the judgment entered by the First Circuit Court of Appeals.[17]

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[17] If this Court does not so rule, then Plaintiffs request a remand to the First Circuit Court of Appeals to determine which of the § 1983 claims of these thirty-six Plaintiffs are not time-barred even if *American Pipe's* tolling rule of suspension is applicable to them.

As indicated in the Addendum to Defendants' Brief in the First Circuit, several of the Plaintiffs had a considerable amount of time left to their limitations period as of June 19, 1978, the date on which the § 1983 class suit was filed. Two had twenty-two days, one had forty-two, one had fifty and one had one hundred-thirty eight days. It will be recalled from the Counter Statement of the Case that after the District Court's denial of class certification on August 21, 1978, there was a motion for reconsideration which was denied on September 29, 1978; there was next a motion for leave to file an Amended Complaint joining all of the Plaintiffs, which was denied on November 24, 1978; and there was finally a motion for reconsideration which was denied on December 11, 1978. Consequently, *American Pipe's* tolling of the Puerto Rico one-year limitations period continued until this last date when the District Court's decision not to allow the Plaintiffs to participate in the original § 1983 class suit became final. *Cf. Burnett* v. *New York City Rr. Co.*, 380 U.S. 424 (1965), discussed in this Brief at pp. 11-12.

Plaintiffs request such a remand for another reason: to consider the applicability of Puerto Rico tolling law to Plaintiffs' pendent Puerto Rico claims which were submitted to the jury. *See* Counter Statement of the Case.

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